No. 14542

IN THE

United States Court of Appeals

for the Ninth Circuit

CHESTER GUITH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT, FOR THE DISTRICT OF MONTANA

Filed 1955

..... Clerk

No. 14848

IN THE

United States Court of Appeals

for the Ninth Circuit

CHESTER GUITH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT, FOR THE DISTRICT OF MONTANA

TABLE OF CONTENTS

TABLE OF CASES

TABLE OF STATUTES

NAMES AND ADDRESSES OF ATTORNEYS

KREST CYR,
United States Attorney,
Butte, Montana;

MICHAEL J. O'CONNELL,
Assistant United States Attorney,
Butte, Montana;

FRANK M. KERR,
Assistant United States Atttorney,
Butte, Montana,
Attorneys for Appellee.

JERRY J. O'CONNELL,
Barber-Lydiard Building,
Great Falls, Montana,
Attorney for Appellant.

SUMMARY OF THE QUESTIONS ON APPEAL

The questions presented by this appeal, as determined from and urged by Appellant's brief, are five in number, and they appear as follows:

First: Whether or not the trial court below had jurisdiction over the offense charged.

Second: Whether or not the trial court below erred in admittting Appellee's Exhibit No. 1 and denying objection to all of the testimony of the witness, Dr. King, on the grounds that no proper foundation had been laid to connect the said exhibit or said testimony with the Appellant herein.

Third: Whether or not the trial court below erred in refusing to admit Appellant's proposed Exhibit No. 4, which was a letter from a firm of attorneys which asked the Appellant to come to their office to discuss this case with them, it appearing that said exhibit was offered for the purpose of impeaching the testimony of Edward Gobert, No. 2.

Fourth: Whether or not the trial court below erred in instructing the jury that Section 7, Subdivision 3, Title 18, U. S. C. A., applied to the case, in view of the fact that the Appellant held a deed to the land upon which the crime was committed, and that there was no reservation of any kind or nature on the part of the United States pertaining to said land.

Fifth: Whether or not the trial court below erred in admitting into evidence the testimony of the Federal Bureau of Investigation Special Agent Gene Fopp, relative to the admissions of the Appellant which the Appellant contends amount to a confession.

STATEMENT OF JURISDICTION

The Appellant herein, Chester Guith, was indicted by a Grand Jury, sitting in the United States District Court for the District of Montana, on the 9th day of November, 1954. The indictment contained a single count, which charged that on or about the 9th day of January, 1954, at the Guith ranch, approximately ten miles west of the City of Cut Bank, and at a place within the exterior boundaries of the Blackfeet Indian Reservation, being Indian country, and within the State and District of Montana, the Appellant, Chester Guith, did wilfully, unlawfully and feloniously have sexual intercourse with one Eleanora Gobert, a female Indian person of the age of fifteen (15) years, and not at said time the wife of said Appellant. The Appellant entered a plea of not guilty to the said indictment on the 9th day of June, 1955, in the United States District Court for the District of Montana, Great Falls Division, and the Appellant was tried by the said Court sitting with a jury on June 9, 10, and 11, 1955. On the 11th day of June, 1955, the jury returned a verdict finding the Appellant guilty in manner and form as charged in said indictment, and endorsed on said verdict the words "we recommend leniency." The said Court then pronounced judgment upon the said Appellant and sentenced the Appellant to serve six (6) years in a Federal penitentiary.

The Appellant appealed from the said judgment and sentence, giving his notice of appeal to this Court on June 13, 1955.

STATEMENT OF THE CASE

The Appellant is a white man, who resides on a ranch located on deeded land and lying within the exterior boundaries of the Blackfeet Indian Reservation.

The Prosecutrix is a female Indian ward of the Government of the age of fifteen (15) years, and she resides with her parents on a farm located on the Blackfeet Indian Reservation, approximately one-half mile from the farm of the Appellant. On January 9, 1954, the Prosecutrix, at the request of her father, placed a truck battery upon a sled at about noon of that day, and pulled the battery to the home of the Appellant for the purpose of having the battery charged. Upon arriving at the Appellant's ranch, she knocked on the door of the residence, and receiving no answer, she proceeded to look for the Appellant. She found the Appellant in a tool shed located on Appellant's ranch. Appellant advised that the battery-charger was in town being repaired, and proceeded to converse with the Prosecutrix. When the Prosecutrix attempted to leave, the Appellant grasped her and placed her upon the dirt floor of the tool shed where he proceeded to remove the jean trousers she was wearing. He then had an act of sexual intercourse with the Prosecutrix and afterwards admonished her that she should not tell anyone what they had done and also that she should go to the toilet so that she would not have a baby. The Prosecutrix then returned to her home and did not complain regarding the offense to anyone.

On the 2nd day of October, 1954, the Prosecutrix gave birth to a baby at the agency hospital, with Dr. King in

attendance. Dr. King advised the Federal Bureau of Investigation of the birth of the child to an unwed juvenile mother, and after that, the Prosecutrix, for the first time, made the admission that she had had sexual intercourse with the Appellant on the 9th day of January, 1954, at the Guith ranch. Her memory as to the date is clear because that particular January 9th happened to be the first Saturday after school had resumed after the Christmas vacation. The baby which the Prosecutrix had was considered by Dr. King, an expert witness, to be a full-term baby, and if anything, even longer than a full-term child. During pregnancy, the Prosecutrix carried the baby in a highly unusual manner, the head of the child being under the ribs of the Prosecutrix, and the feet and legs extending down into her pelvic regions; thus, the pregnancy was masked and the Prosecutrix was able to keep her secret.

The Appellant's defense to the charge was in the nature of an alibi that he had been in town and not at his ranch during the middle of the day of January 9, 1954. Attempts on the part of the Appellant to corroborate this alibi were weak and not convincing.

The question of jurisdiction and the basis therefor will appear clearly in the argument contained in this brief.

ARGUMENT

The Appellant makes five (5) specifications of error which will now be considered individually and in the order in which they are presented in Appellant's brief.

The Trial Court Below Properly Assumed Jurisdiction Of This Case.

A brief consideration of the law will make it appear conclusively that the court below had jurisdiction of this case.

Remembering that the Appellant is a white man and the Prosecutrix is an Indian and that the crime was committed on deeded land lying within the exterior boundaries of an Indian reservation, we should first examine Title 18, U. S. C. A., 1152, which reads as follows:

> "Laws governing. Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.
>
> This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively. June 25, 1948, c. 645, 62 Stat. 757."

As used in this statute, the words "sole and exclusive" do not apply to the jurisdiction extended over the Indian country, but are only used in the description of the laws

which are extended by reason of this statute to operate on offenses committed in the Indian country. Ex parte Wilson, Arizona, 1891, 11 S. Ct. 870, 140 U. S. 575, 35 L. Ed. 513; Ex parte Nowabbi 1936, 61 P. 2d, 1139, 60 Okla., Cr. 111.

Next we should look at the definition of "Indian country," which is set out in Title 18 U. S. C. A., 1151, the pertinent portions of which appear as follows:

> ". . . 'the term Indian country', as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through reservations . . ."

Because of Statute Title 18 U. S. C. A., 1152, supra, we must determine whether or not there is a Federal law defining the crime of statutory rape which is applicable to offenses committed in any place within the "sole and exclusive" jurisdiction of the United States, and we find such a law in Title 18 U. S. C. A., 2032, which reads as follows:

> "Carnal knowledge of female under 16. Whoever, within the special maritime and territorial jurisdiction of the United States, carnally knows any female, not his wife, who has not attained the age of sixteen years, shall, for a first offense, be imprisoned not more than fifteen years, and for a subsequent offense, be imprisoned not more than thirty years. June 25, 1948, c. 645, 62 Stat. 795."

Thus, it is clear that a crime committed by a white man against a ward Indian within the Indian country is a

proper subject for Federal jurisdiction.

The Appellant contends that there is a lack of jurisdiction because the crime in the subject case was committed on fee patent land located on and within the reservation. This court has recognized Federal jurisdiction of subject case in the case of Williams v. United States, 215 F. 2d., 1, wherein it lays down the legal principle that there shall be no failure of Federal jurisdiction because of the fee patent nature of the land upon which the crime was committed, so long as the crime was committed on land which lies within the limits of the Indian reservation.

The court below was correct in charging the jury that the facts of the case vested the court with jurisdiction.

The Court Was Correct In Admitting the X-Ray Showing the Prosecutrix to be Pregnant and the Testimony of Dr. King Relative to the X-Ray, the Pregnancy and the Delivery of the Child.

The X-ray was made by Dr. King on the 2nd day of October, 1954, (Tr. 70), which was the same day that Dr. King attended the birth of the baby shown by the X-ray. (Tr. 68.) Dr. King testified that the baby which he delivered and which was shown in the X-ray could have been the result of an act of sexual intercourse which occurred on the 9th day of January, 1954. (Tr. 68, 69.)

This evidence is extremely important in corroborating the testimony of Eleanora Gobert that she had had sexual intercourse with the Appellant on the 9th day of January, 1954. (Tr. 29, 30, 31.)

The Prosecutrix testified that she had a baby on October 2, 1954, which was delivered by Dr. King. (Tr. 32, 33.) She also testified that she had never had sexual intercourse with anyone other than the Appellant. (Tr. 33, 34.)

Thus, if the Prosecutrix had sexual intercourse on January 9, 1954, with Appellant and had never at any time had sexual intercourse with any man other than the Appellant, it appears clearly that the pregnancy is the result of an act of sexual intercourse with the Appellant. The X-ray which is Appellee's Exhibit No. 1, and the testimony of Dr. King relative to the delivery of the baby and to the period of gestation required for the birth of a human baby, are of great value in corroborating the testimony of the Prosecutrix.

The Court Committed No Error in Refusing to Admit Into Evidence A Letter Received by Appellant From An Attorney, for the Purpose of Impeaching the Testimony of Witness Edward Gobert, No. 2.

Appellant testified that he received Appellant's proposed Exhibit No. 4, a letter, in the regular course of the mail; and that the letter was from Mr. Aronow, a Shelby attorney, and that as a result of receiving the letter the Appellant went to see Mr. Aronow. Appellant further contends that the purpose of this exhibit was to impeach the testimony of witness Edward Gobert, No. 2.

This presents no problem in that no proper foundation was laid for such an impeachment. Edward Gobert, No.

2 did not testify on either direct examination or cross-examination that any such letter was or was not writtten, or that it was or was not received by the Appellant, and he did not testify as to the contents of any such letter or that he ever knew anything about such a letter.

It is a well settled rule of law that there can be no impeachment of a witness until the witness has testified with some particularity as to the facts which constitute the basis of the impeachment. Bearman v. Prudential Insurance Company of America, 186 F. 2d, 662. According to the Bearman case, supra, the letter could not have been received in evidence as proof of the facts therein stated, and further that it could be introduced in evidence only to impeach the writer of the letter or a person denying the receipt or existence of such a letter.

In the absence of any proper foundation, it is obvious that the letter could not be used to impeach the testimony of Edward Gobert, No. 2.

The Court Below Committed No Error In Instructing the Jury That Section 7, Subdivision 3, Title 18, U. S. C. A., Applied to This Case.

In order to properly consider this question, we must read the court's instruction relative to jurisdiction, (Tr. 186, 187, 188), as a whole, and it appears as follows:

> "Now before I overlook it it has been stated here by counsel that proof has not been submitted that this is within the Indian country. And I want to disabuse your minds of that situation right at this time. When you started there was testimony in this case that the Guith ranch is within the exterior boundaries of the

Blackfeet Indian Reservation, and that is sufficient, so I need not give that question further consideration.

Now the law, I should call your attention, of course, to the law upon which this information is based. I am reading from Section 1152 of the United States Code Annotated, Title 18:

'Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country'.

And from Section 1151:

'Indian country defined. Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country," as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, nothwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, * * *.'

Now the federal statute upon which this indictment rests is found in Section 2032 of Title 18, United States Codes Annotated, and it reads, as follows:

'Whoever, within the special maritime and territorial jurisdiction of the United States, carnally knows any female, not his wife, who has not attained the age of sixteen years, shall, for a first offense, be imprisoned not more than fifteen years, and for a subsequent offense, be imprisoned not more than thirty years.'

Within the territorial jurisdiction of the United States, and that requires some definition and that is found in Title 18, United States Codes Annotated, Section 7, subdivision (3) which illustrates the mean-

ing of that, what I have just read to you. Subdivision (3):

'Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.'

You will note then that would be any lands reserved or acquired for the use of the United States and under the exclusive or concurrent jurisdiction thereof, which fits this case precisely."

Then, according to the lower court's instruction, we must apply Title 18 U. S. C. A., 1152, supra, and Title 18 U. S. C. A., 1151, supra, which unequivocally direct us to Title 18 U. S. C. A., 2032, supra, as the law applicable to the facts of this case. Then, it appears that the law operates in effect to lift from the carnal knowledge statute, 18 U. S. C. A., 2032, supra, the words "within the special maritime and territorial jurisdiction of the United States" and to substitute in it's stead, the words "Indian country" so that Title 18, U. S. C. A., 2032, supra, when read in the light of the definition of Indian country and Title 18 U. S. C. A., 1152, supra, would read as follows:

"Whoever, *within the Indian Country,* carnally knows any female, not his wife, who has not attained the age of sixteen years shall, for a first offense, be imprisoned not more than fifteen years, and for a subsequent offense, by imprisonment not more than thirty years."

The Court, in reading to the jury Title 18 U. S. C. A., Section 7, (3), which reads as follows:

> "The term 'special maritime and territorial jurisdiction of the United States' as used in this Title, includes:
>
> (3) Any lands reserved or acquired for the use of the United States and under the exclusive or concurrent jurisdiction thereof, . . ."

was obviously stating to the jury the Congressional authority for the enactment of Title 18 U. S. C. A., 1151, supra, which defines Indian Country and Title 18 U. S. C. A., 1152, supra, which advises us which laws shall apply to crimes committed in the Indian country by a white man against an Indian person.

The Admission of the Testimony of Gene Fopp to the Effect That Appellant Admitted Having Sexual Inter-Course with the Prosecutrix on Several Occasions Was Not Error in that the Testimony Was Admitted for the Purpose of Impeaching the Appellant as a Witness.

The Appellant opened the door for impeachment when he took the stand and on his direct examination (Tr. 144, 145) testified as follows:

> "Q. (By Mr. J. J. O'Connell): Now she went on further and said that after this alleged occurrence on January 9th, 1954, that on three or four other occasions within a period of three or four weeks after the occurrence on January 9th, 1954, that you again had sexual intercourse with her, is that testimony true or false.

A. Very false.

Q. Did you have sexual intercourse with her on those three or four occasions?

A. No."

A foundation for the impeachment of the Appellant as a witness was laid on cross examination of the Appellant by the following testimony (Tr. 156, 157):

"Q. By Mr. J. J. O'Connell (Should read M. J. O'Connell): I will ask you, Mr. Guith, whether or not on the 12th day of October, 1954, you told F. B. I. Agent Gene Fopp that you had sexual intercourse?

A. I didn't.

Q. With Eleanora Gobert?

A. I did not.

Q. I ask you now if you deny that you told Special Agent Gene Fopp on October 12th, 1954, that you had sexual intercourse with Eleanora Gobert several times?

A. I never told him that.

Q. Are you denying it?

A. I am denying it."

Finally, the Appellant was impeached as a witness when, on rebuttal, Federal Bureau of Investigation Special Agent Gene Fopp on his direct examination stated as follows (Tr. 163, 164, 165, 166):

"Q. (By Mr. M. O'Connell): Mr. Fopp, when was the first time that you talked to Chester Guith in connection with this case?

A. October 12, 1954.

Q. October 12, 1954?

A. Yes, sir.

Q. And where did you talk to him?

A. On the field a short distance from his house, I would say possibly one-quarter of a mile near the Gunsight Elevator about a mile off of Highway No. 2 north.

Q. Who was present at that conversation?

A. He and I were just present at the conversation; there were other workmen a short distance from the automobile but I removed him some more personally. I asked him to come and speak to me in confidence and we came to my automobile and I spoke to him there.

Q. What time of the day was it?

A. I started at 11:50 a. m. when I arrived.

Q. How long did you continue to talk?

A. By my notes I concluded it at 12:30.

Q. Could you tell us what that conversation was?

A. Yes. I introduced myself to him and displayed my credentials so he would know who I was and advised him I came to talk with him concerning a serious matter; that the allegation had been made he was the father of a child born by a juvenile girl therefore it would be automatically statutory rape. I advised him that he need not say anything to me at all; that he was entitled to an attorney, and that anything that he did tell me could be used in a court of law against him. I then informed him of the

identity of the girl who had the child and the fact that she had named him as the person having had intercourse with her, the result of which was the child in question born October 2, 1954.

Q. Just a moment now. Was there any, did you notice any physical change in the defendant when you first announced what the nature of the charge was?

A. Yes, sir.

Q. What was the change?

A. Well he became quite concerned and blood drained from his face and I suggested he sit down in the car. We continued our conversation either on the side of the car or inside of the car.

Q. And what was the conversation?

Mr. J. J. O'Connell: Now just a minute. I want to object to the general broad character of this question and the danger of incompetent and inadmissible evidence coming in without any opportunity to object and to keep it from the jury and I think the question should be in detail.

Mr. M. O'Connell: Just a moment. I withdraw the last question.

Q. (By Mr. M. O'Connell): Tell me during the course of that conversation did Chester Guith admit or did he not admit having intercourse with Eleanora Gobert?

A. He admitted.

Mr. J. J. O'Connell: Now just a minute. Your honor, to which we object on the ground that this

actually amounts to confession rather than admission and there has been no proper foundation laid for any admission of a confession.

The Court: Overrule the objection.

A. He admitted having had intercourse with her.

Q. On one or more occasions?

A. On three or four occasions.

Mr. M. O'Connell: You may cross examine."

Thus, the impeachment of the Appellant as a witness was completed.

It is well established law that a witness may be impeached by the introduction of prior inconsistent statements. A recent and clear statement of this rule may be found in the case of United States v. Schneiderman, 106 F. S. 906, 929, wherein the Court said:

> "A witness may be discredited or impeached by contradictory evidence; or by evidence that at other times the witness has made statements that are inconsistent with the witness' present testimony."

Then, it immediately appears that this testimony was properly admitted for the purpose of impeachment.

It is difficult to conceive how anyone could consider this testimony to amount to a confession in view of the fact that the Appellant merely admitted having had sexual intercourse with the Prosecutrix on three or four occasions, and did not testify as to any dates, places, times or circumstances of the acts.

CONCLUSION

For the reasons stated in the argument, we believe that this Court will agree with us that the Appellant has failed to specify any prejudicial or reversible error on the part of the court below in his presentation of the case to this Court.

Respectfully submitted,

KREST CYR,
United States Attorney,
District of Montana;

MICHAEL J. O'CONNELL,
Assistant United States Attorney,
District of Montana;

FRANK M. KERR,
Assistant United States Attorney,
District of Montana,
Attorneys for Appellee.